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SUPREME COURT, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LESTER C. CASTEEL
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

IS CONFRONTATION SATISFIED FOR THE ADMISSION OF A RESIDUAL HEARSAY STATEMENT WHEN THE DECLARANT CANNOT BE CROSS-EXAMINED BECAUSE SHE DISCLAIMS ALL KNOWLEDGE OF THE STATEMENT AND THE UNDERLYING EVENT?

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OPINIONS BELOW

The September 30, 1996 opinion of the United States Court of Appeals for the Armed Forces [hereinafter C.A.A.F.], *United States v. Casteel*, __ M.J. __, (C.A.A.F. 1996), is reprinted as Appendix A at Pet. App. 1a.

The March 31, 1994 unpublished opinion of the Navy-Marine Corps Court of Military Review [hereinafter N.M.C.M.R.], *United States v. Casteel*, No. 93-00109 (N.M.C.M.R. March 31, 1994), is reprinted as Appendix B at Pet. App. 26a.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Court of Military Review on September 30, 1996 (Appendix A at Pet. App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

STATEMENT OF THE CASE

At his trial in June 1992, Petitioner was charged with various offenses of child sexual abuse involving two of his own children and two children of his live-in girlfriend. One of the charges alleged he committed indecent acts with Allison Garling, the six-year-old daughter of his girlfriend. Based on pretrial interviews with Allison, the prosecutor believed that Allison would not or could not testify at trial about the allegations. The prosecutor believed that Allison would either deny the abuse occurred, or have an actual or feigned memory loss about the abuse. The government moved *in limine* for admission of an audio tape interview of Allison taken by a police officer a year earlier. Defense counsel objected to the admission of the taped interview on grounds that it violated Petitioner's right to confrontation guaranteed under the Sixth Amendment.

In support of his motion requesting admission of the tape, the prosecutor presented only three documents: a transcript of the interview, a statement by the police officer which summarized the interview, and a statement of a therapist who had been treating Allison. The trial judge made a provisional ruling that if the prosecutor's assertions were true, he would admit the taped interview under Military Rule of Evidence 803(24) because it had "some accompanying guarantees of trustworthiness." Specifically, the trial judge found that the statement did not appear rehearsed, it appeared to be from Allison's memory as opposed to suggestive questioning, and it appeared that Allison was afraid of Petitioner.

During trial, three of the children testified concerning the charges pertaining to them and were cross-examined by Petitioner's defense counsel. Allison was not cross-examined. Allison testified via video camera from a separate room. Allison's entire sworn testimony consisted of:

> Q. Where do you live now?
> A. Pixley.
> Q. And whose--who do you live with?
> A. Grandma Hanley.
> Q. And who is she?
> A. My foster mother.
> Q. And did you use to live in Porterville [California]?
> A. Yeah.
> Q. And where did you live before that?
> A. Virginia.
> Q. And do you remember the first time Sally [Detective Sally Blagg,] came to see you?
> A. Yeah.

Q. Was that--is that a long time ago?
A. Yeah.
Q. Have you ever told a lie to Sally?
A. (No audible response.)
Q. Okay. When--when you talked to Sally with the tape recorder, did you tell her the truth?
A. The things that I told her was, I think----
Q. Do you think what you told her was the truth?
A. I don't know. I don't remember what I told her.
Q. Okay. Okay. How do you ... feel about-do you remember Charlie [the familial name for appellant, Lester Charles Casteel]?
A. (No audible response.)
Q. How do you feel about Charlie?
A. Still mad at him.
Q. Why?
A. Because he did mean things to me.
Q. What--what kind of mean things did he do?
A. Spanked us.
Q. Did he do other things too?
A. (No audible response.)
Q. Did he do other bad things to children other than spank them?
A. I don't know.
Q. Did--do you think Charlie might have done some bad things to you?
A. I don't know.
Q. Did Charlie--do you remember if Charlie ever touched you somehow that you didn't like?
A. I don't know.

Q. Okay.
TC: I don't have any other questions.
DC: I don't have any questions, sir.
MJ: Okay. Thank you very much.

Her very limited testimony, as the prosecutor predicted, was ineffectual. Defense counsel did not cross-examine Allison, and there was no inquiry from the trial judge. Over continuing objection by the defense, the judge reaffirmed his earlier ruling and admitted the tape into evidence on the basis that Allison was "nonavailable to provide this information."

Petitioner was convicted by a panel of officer and enlisted members of all charges and specifications and was sentenced to confinement for eight years, reduction to the lowest enlisted pay grade, and a dishonorable discharge. The taped interview was the only evidence supporting the charge concerning Allison.

On review, the Navy-Marine Corps Court of Military Review found confrontation satisfied and affirmed Petitioner's conviction. The Navy-Marine Court noted that the trial judge analyzed the circumstances of the tape recording pursuant to this Court's decision in *Idaho v. Wright*, 497 U.S. 805 (1990), adopted the trial judge's findings, and found that he did not abuse his discretion in admitting the tape. (Pet. App. at 29a)

The Court of Appeals of the Armed Forces reached the same result, but did so by a different analysis. Relying on *United States v. Owens*, 484 U.S. 554 (1989), the court held that Petitioner's right to confrontation was satisfied because Allison was present at trial and subject to cross-examination. (Pet. App. at 8a). C.A.A.F. found that the defense simply declined to cross-examine Allison for tactical reasons. (Pet. App. at

8a, 10a). The court then reviewed the judge's findings concerning the reliability of the statement, under a purely evidentiary standard, and determined that he did not abuse his discretion in admitting the tape. (Pet. App. at 9a).

REASONS FOR GRANTING THE WRIT

THE RIGHT TO CONFRONTATION IS NOT SATISFIED WHEN A RESIDUAL HEARSAY STATEMENT IS ADMITTED AND THE DECLARANT CANNOT BE CROSS-EXAMINED ABOUT THE MAKING OF THE STATEMENT OR THE UNDERLYING EVENT.

Petitioner asks this Court to answer the "question lurking" in the case of *California v. Green*, 399 U.S. 149 (1970), and acknowledged again in *Delaware v. Fensterer*, 474 U.S. 15, 21 (1985). That is: whether the Confrontation Clause is satisfied for the admission of a hearsay statement in the case of a witness who is physically present at trial, but who cannot be effectively cross-examined because she has no present knowledge of the ultimate event in the statement? *Green*, 399 U.S. at 169 n.18; *Fensterer*, 474 U.S. at 21. Answering this question will resolve a growing split of opinion among the federal circuits over the interpretation of this Court's precedence concerning the interplay of the hearsay rules and the Confrontation Clause.

In recent years, C.A.A.F. has consistently held that the right to confrontation on a hearsay statement is satisfied as long as the declarant is physically present. *United States v. McGrath*, 39 M.J. 158, 163 (C.M.A.

1994) (confrontation satisfied where witness was present but refused to testify), *cert. denied*, 115 S. Ct. 420 (1994); *United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994) (confrontation satisfied by declarant's presence despite his claim of memory loss of the underlying event and that his hearsay declaration was a lie), *cert. denied*, 115 S. Ct. 907 (1995).

This same rational has been applied by the courts in the Third and Fourth Circuits, holding that confrontation is satisfied where the witness claims memory loss of the underlying event at the time of trial. *United States ex rel. Thomas v. Cuyler*, 548 F.2d 460 (3rd Cir. 1977); *United States v. Payne*, 492 F.2d 449 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974).

The U.S. Court of Appeals for the Eighth Circuit, on the other hand, has recognized that there are some cases where the mere presence of a witness does not satisfy the Confrontation Clause, particularly where the witness is too young or too frightened to be subject to a thorough cross-examination. *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991), *cert. denied*, 502 U.S. 1101 (1992); *Dolny v. Erickson*, 32 F.3d 381, 386 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 907 (1995); *Johnson v. Lockhart*, 71 F.3d 319, 321 (8th Cir. 1995).

The U.S. Court of Appeals for the Seventh Circuit has decided cases similar to Petitioner's, but has yet to reach the question concerning a complete memory loss and the application of the Confrontation Clause. *United States v. Baker*, 722 F.2d 343, 349 n.13 (7th Cir. 1984) ("We express no view on whether the [witness's] prior statement would have been admissible had her memory lapse been more complete or more believable."), *cert. denied*, 465 U.S. 1037 (1984). The Seventh Circuit has looked to the veracity of the memory loss in

determining whether confrontation has been satisfied. *Vogel v. Percy,* 691 F.2d 843, 846 (7th Cir. 1982) (witness remembered all relevant events leading up to, but not including robbery, court found memory lapse "so selective as to be incredible"); *see also United States v. DiCaro*, 772 F.2d 1314, 1327 (7th Cir. 1985) ("Compared to the witness's testimony in *Baker* and *Vogel*, [this witness's] memory lapse at trial concerning both the making and the subject matter of his prior statements was clearly more complete, although probably not more believable."), *cert. denied*, 475 U.S. 1081 (1986).

This petition presents the situation described in *Spotted War Bonnet* and its progeny: the admission of a residual hearsay statement of a child witness who, because she is too young or possibly too frightened, claims she neither remembers making the statement nor the underlying events, so that any cross-examination would be a futile gesture. Petitioner seeks resolution of this developing split in the circuits over this substantial issue concerning confrontation of a witness's out-of-court statement for which the witness has no memory. This issue is certain to recur, particularly in child sexual abuse cases.

"The Confrontation Clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion). The Confrontation Clause is satisfied for the purposes of admitting hearsay statements against a criminal defendant when the declarant is present at trial and subject to cross-examination. *California v. Green*, 399 U.S. 149 (1970). This is true even if the witness claims he cannot remember the underlying event, *so long as* the witness

concedes making the statement and may be asked to defend or otherwise explain any inconsistency between the prior statement and the present version. *Id.* at 164. "[E]ffective confrontation of [a hearsay declarant is] possible only if [the declarant first] affirm[s] the statement as his." *Douglas v. United States*, 380 U.S. 414, 420 (1965).

The lower court erroneously relied upon this Court's precedent in *Owens* when it found Petitioner's right to confrontation satisfied by the fact that Allison was present at trial. (Pet App. at 8a). In so doing, the lower court ignored the Confrontation Clause's guarantee of a meaningful opportunity for cross-examination and relied upon the fact that the Clause does not guarantee an effective cross-examination. (Pet. App. at 8a). Faced with the "lurking question" from *Green*, the lower court misconstrued this Court's opinion in *Owens* when it decided that Petitioner's right to confrontation was satisfied.

Although the question in *Green* was "squarely presented" in *Owens*, this Court answered only part of the issue. *Owens*, 484 U.S. at 559. Writing for the majority in *Owens*, Justice Scalia stated, "we agree with the answer suggested 18 years ago by Justice Harlan. 'The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish.'" *Id.*, *citing Kentucky v. Stincer*, 484 U.S. 730, 739 (1987), *quoting Fensterer*, 474 U.S. at 20 (emphasis added in *Owens*). It was this specific language that the lower court relied upon in deciding Petitioner's case. (Pet. App. at 8a).

As previously mentioned, *Owens* answered only part of the question. *Owens* involved a victim of a violent assault who could not identify his assailant at

trial. As a result, the government entered into evidence the victim's out-of-court statement where he did identify Owens as his assailant. While the victim could not recall his assailant at trial, he did testify that he "clearly remembered" identifying Owens as his assailant during an interview with a police officer while he was in the hospital. *Id.* at 556. This Court found no confrontation problem with the admission of the unsworn statement because even though he could not remember the underlying event, *the witness remembered making the statement and was subject to cross-examination about it.* Despite the witness's memory loss, Owens still had the *opportunity* to cross-examine him and bring out matters concerning bias, lack of care and attentiveness, poor eyesight and especially poor memory, which this Court observed is often the desired result of a thorough and effective cross-examination. *Id.* at 559.

Owens, therefore, resolved the issue concerning the admissibility of unsworn out-of-court statements. It did not resolve the deeper question described in *Green* and mentioned again in *Fensterer*. That is, whether the Confrontation Clause is violated when feigned or actual lapse of memory concerning the out-of-court statement *and* the underlying event is so pervasive that any cross-examination is meaningless.

Petitioner had no meaningful opportunity to cross-examine Allison on the out-of-court-statement. Based upon her complete lack of memory as to making the statement or the underlying event, any attempt to cross-examine Allison would have been futile. Allison's complete lack of memory denied Petitioner an opportunity for cross examination on the out-of-court statement. It would seem axiomatic that petitioner could not cross-examine that which does not exist.

"The primary object of the constitutional

provision in question was to prevent depositions or *ex parte* affidavits . . . being used against a prisoner in lieu of a personal examination and cross examination of the witness . . . ." *Mattox v. United States*, 156 U.S. 237, 242 (1894). Particularly, this Court has recognized that such a face-to-face confrontation in the form of cross-examination is the "greatest legal engine ever invented for the discovery of truth." *Id.* at 158, *quoting* 5 Wigmore § 1367. Central to the protection afforded by confrontation is the witness's ability to repeat his story or repudiate any conflicting prior stories before the trier of fact. *Id.* at 157. Only under these circumstances is there an *opportunity* for real and meaningful cross-examination. This is not true when the witness is too young, or too frightened, or disclaims making the statement or the underlying event. In these situations, cross-examination is a hollow gesture because there is no "statement" or "event" in dispute. The result of the lower court's decision is that as long as a declarant is physically present within the courthouse, confrontation will be satisfied. The lower court's precedent does not prevent trial by *ex parte* affidavits, but instead encourages such a practice.

Where the right to question a witness is restricted or virtually eliminated by constitutional limitations or evidentiary rules, this Court has not hesitated to find a violation of the right to confrontation. *Douglas v. Alabama*, 380 U.S. 415 (1965). In *Douglas*, this Court found such a violation when the state introduced the alleged confession of the defendant's supposed accomplice, and the accomplice refused to testify on self-incrimination grounds. Finding that the evidence tended to show that the accomplice only made the statement, and that he could not be cross-examined to determine the truth of the statement itself, this Court

held the admission of the confession to be in violation of the defendant's right to confrontation. *Id.* at 419-420. *See also Bruton v. United States*, 391 U.S. 123 (1968); *Mayes v. Sowders*, 621 F.2d 850 (6th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980); *Barksdale v. State*, 453 S.E.2d 2 (1995).

Where Allison had no memory of the out-of-court statement or the underlying event, she could not be cross-examined on a statement imputed to her yet not admitted by her. Even more important, cross-examination of Allison or the detective would have done nothing to demonstrate the truth of the hearsay statement.

CONCLUSION

Cross-examination is the means by which an accused can test the veracity of any witness, regardless of whether the testimony is an in-court or out-of-court statement. The Confrontation Clause of the Sixth Amendment guarantees that every accused has the right to avail himself of this valuable tool. Currently, the military and at least two other circuits have removed this right from the accused and have returned to the practice that the Confrontation Clause was designed to prevent: trial by *ex parte* affidavits. The result of the lower court's precedent is one of form over substance. Specifically, if the government has a witness physically present within the courthouse, then confrontation has been satisfied, notwithstanding the fact that the witness has no memory of ever making the out-of-court statement or the underlying facts the statement allegedly describes.

The better rule is the one enunciated by this Court in *Douglas* where confrontation is not satisfied when the

witness cannot be questioned about the previous statement or the underlying event. This Court's precedent in *Douglas* guarantees an accused the means to test the veracity of statements which the government is offering against him. This Court should address this substantial issue as to whether an accused is provided confrontation on a statement when the witness has no memory of the statement or the underlying event.

Respectfully submitted,

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December 1996

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 94-1430

CMR 93 0109

United States, *Appellee*

v.

Lester C. CASTEEL, Aviation Structural Mechanic (Hydraulics) First Class
U.S. Navy, *Appellant*

Argued Oct. 31, 1995

Decided Sep. 30, 1996

For Appellant: *Captain John F. Havranek*, USMC (argued); *Lieutenant Paul J. Ferdenzi*, JAGC, USNR (on brief).

For Appellee: *Lieutenant John R. Livingston, Jr.*, JAGC, USN (argued); *Commander D.H. Myers*, JAGC, USN (on brief); *Colonel J. Composto*, USMC, *Commander S.A. Stallings*, JAGC, USN, *Lieutenant Commander David B. Auclair*, JAGC, USN.

Military Judge: Phillip F. Roberts

Opinion of the Court

COX, Chief Judge:

A general court-martial comprised of officer and enlisted members at Naval Station Treasure Island, San Francisco, California, convicted appellant, contrary to his pleas, of sodomy on a child under the age of 16 (2 specifications); committing indecent acts upon the body of a child under the age of 16 (3 specifications); taking indecent liberties with a child under the age of 16; and wrongfully endeavoring to impede an investigation by communicating a threat, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 USC §§ 925 and 934, respectively. The members sentenced appellant to a dishonorable discharge, confinement for 8 years, and reduction to E-1. The convening authority approved the sentence, and the Court of Military Review[1] affirmed the findings and sentence in an unpublished opinion.

We grant review of these issues:

I

WHETHER ADMISSION OF ... [AG'S] HEARSAY STATEMENT VIOLATED APPELLANT'S SIXTH AMENDMENT PROTECTION UNDER THE CONFRONTATION CLAUSE WHEN THE STATEMENT LACKED ADEQUATE INDICIA OF RELIABILITY.

---

[1] *See* 41 MJ 213, 229 n.*/ (1994).

II

WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE AVAILABLE DECLARANT OF A RESIDUAL HEARSAY STATEMENT WHEN HE WAS NOT AFFORDED AN OPPORTUNITY TO FULLY AND EFFECTIVELY CROSS-EXAMINE THE DECLARANT AFTER THE RESIDUAL HEARSAY STATEMENT WAS INTRODUCED INTO EVIDENCE.

III

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED, AS A MATTER OF LAW, WHEN IT AFFIRMED THE MILITARY JUDGE'S RULING TO ALLOW PRIOR MISCONDUCT INTO EVIDENCE UNDER MILITARY RULE OF EVIDENCE 404(b) ON THE BASIS THAT APPELLANT PLACED THE ELEMENT OF INTENT IN ISSUE WHEN DEFENSE COUNSEL CROSS-EXAMINED THE VICTIM ABOUT INNOCENT ACTS OF CONTACT BETWEEN THE VICTIM AND APPELLANT.

Finding no error in the granted issues, we affirm.

ISSUE I

The first issue concerns the propriety of the receipt into evidence of a prior out-of-court statement of an alleged victim. Specification 4 of Charge IV alleged that appellant "did, at or near Virginia Beach, Virginia, on divers occasions between January 1989 and January 1990, commit indecent acts upon the body of ... [AG], a female under sixteen years of age, not the wife of the said ... [appellant], by touching and penetrating the vagina of the said ... [AG] with his hands and fingers, with intent to arouse and gratify the sexual desires of the said ... [appellant]." AG was the daughter of a woman with whom appellant was living at the time. Born on January 12, 1986, AG was approximately 3-4 years old at the time of the alleged offenses.

At the court-martial, AG was called as a prosecution witness. By the time of trial, June 1992, she was approximately 6 1/2 years old. AG testified via closed circuit television from a remote location. This decision was made by the military judge, based primarily upon the opinion of a child sexual abuse therapist that AG was extremely fearful of appellant and that she would probably suffer significant harm by being confronted by appellant. The correctness of the judge's determination is not here in issue.

On direct examination of AG, after establishing her ability to distinguish between truth and falsehood and her understanding of the need to testify truthfully, trial counsel questioned her as follows:

Q. And did you use to live in Porterville [California]?

A. Yeah.

Q. And where did you live before that?

A. Virginia.

Q. And do you remember the first time Sally [Detective Sally Blagg, *see infra*] came to see you?

A. Yeah.

Q. Was that--is that a long time ago?

A. Yeah.

Q. Have you ever told a lie to Sally?

A. (No audible response.)

Q. Okay. When--when you talked to Sally with the tape recorder, did you tell her the truth?

A. The things that I told her was, I think----

Q. Do you thing what you told her was the truth?

A. I don't know. I don't remember what I told her.

Q. Okay. Okay. How do you ... feel about-do you remember Charlie [the familial name for appellant, Lester Charles Casteel]?

A. (No audible response.)

Q. How do you feel about Charlie?

A. Still mad at him.

Q. Why?

A. Because he did mean things to me.

Q. What--what kind of mean things did he do?

A. Spanked us.

Q. Did he do other things too?

A. (No audible response.)

Q. Did he do other bad things to children other than spank them?

A. I don't know.

Q. Did--do you think Charlie might have done some bad things to you?

A. I don't know.

Q. Did Charlie--do you remember if Charlie ever

touched you somehow that you didn't like?

A. I don't know.

Q. Okay.

TC: I don't have any other questions.

DC: I don't have any questions, sir.

MJ: Okay. Thank you very much.

(The witness was excused and withdrew from the closed circuit T.V. room.)

This concluded AG's testimony at the court-martial.

Having anticipated AG's inability or unwillingness to testify, based on information provided by the therapist and recent attempts to interview AG, trial counsel moved *in limine* to introduce a statement made by her much nearer to the time of the alleged events. This prior statement occurred not long after the multiple allegations against appellant came to light, when AG was interviewed in July 1991 by Tulare County, California, Sheriff's Detective Sally Blagg. A portion of that interview was audio-taped, and thereon AG described in considerable detail appellant's alleged sexual abuse of her.

The Government moved admission of this statement under Mil.R.Evid. 803(24) or 804(b)(5), Manual for Courts-Martial, United States (1995 ed.), residual hearsay. Mil.R.Evid. 804(b)(5) provides, in pertinent part:

> (5) *Other exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

* * *

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the military judge determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence.

Mil.R.Evid. 803(24) is identical, except that Mil.R.Evid. 803 begins. "The following are not excluded by the hearsay rule, even though the declarant is available as a witness."

In limine, by agreement of the parties and based on their consistent proffers of fact and on their arguments of law, the military judge ruled provisionally on admission of the hearsay evidence. The focus of the parties and the judge was on the circumstances surrounding the taking of the statement, without reference to corroborating circumstances. At the conclusion of the hearing on the motion, the military judge explained in detail his consideration and balancing of the multiple factors leading to his conclusion that AG's tape-recorded statement to the law enforcement officer met the threshold requirements of the residual hearsay rules. *See* Appendix.

After AG's abbreviated testimony, but prior to

introducing the tape in evidence, the Government called Detective Blagg as a witness. She described the circumstances surrounding the taking of the statement, and was subjected to defense cross-examination on the point.[2] We hold that the granted issue is without merit--that appellant's confrontation rights were not violated due to the Government's production of AG as a witness and the defense's declination of cross-examination. *United States v. Ureta*, 44 MJ 290 (1996); *United States v. Martindale*, 40 MJ 348, 349 (CMA 1994); *United States v. McGrath*, 39 MJ 158, 163 (CMA 1994). As the Supreme Court has consistently noted, "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1988), quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987), quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Ohio v. Roberts*, 448

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[2] The defense was permitted, without prosecution objection, to show the members a video-taped interview of AG that was made approximately a year after the Government's audio tape. At defense request, the interview was conducted by the same person who had interviewed AG a year earlier, Detective Blagg. The defense argued that the video-tape demonstrated the leading and suggestive nature of Blagg's questioning technique. Though not objecting to the playing of the tape, trial counsel objected to that characterization because it was the defense that provided Blagg the questions. Defense counsel countered that the ground rules were that the detective was to ask the questions provided and then was permitted to ask her own questions. In defense counsel's view, the leading and suggestiveness occurred when the detective was asking her own questions. Spin aside, the video-tape was played to the members by defense counsel, after he laid a foundation for them with Detective Blagg. Consistent with her trial testimony, AG--in the main--denied or evaded any questions relating to any sexual misconduct involving appellant. (*But see* R. 243-46.)

U.S. 56, 73 n. 12 (1980).

Regarding the military judge's purely evidentiary decision--not here in issue--to receive the residual hearsay statement, our standard of review is abuse of discretion. *United States v. Pollard*, 38 MJ 41, 49 (CMA 1993); *see generally* S. Childress and M. Davis, *Federal Standards of Review* § 11.02 at 11-5 to 11-9 (2d ed. 1992). We are satisfied in this case that the military judge was within his discretion in balancing the reliability factors inherent in the circumstances of this statement. In particular, we are persuaded by the following factors cited by the judge as indicating reliability: First, the victim's fear of appellant and reluctance to say anything bad about him was akin to a declaration against interest, because the victim perceived that her situation would be made worse by telling the police what appellant did. Second, the questioning was not suggestive. Third, the victim appeared not to be rehearsed, but to be speaking from memory. Fourth (and most persuasive), the victim demonstrated that she was speaking from memory, rather than trying to please the interrogator, because she contradicted the interrogator on several key occasions. In addition, although statements given *ex parte* to law enforcement officials must always be viewed with suspicion, *United States v. Pollard, supra* at 49; *United States v. Barror*, 23 MJ 370, 372 (CMA 1987), we are likewise satisfied here that the military judge adequately assessed that factor.

ISSUE II

In the second issue, appellant contends that he was not afforded an opportunity to be confronted by AG after her prior, audio-taped statement was played before the court members. Appellant's argument is that he had no

ability to cross-examine AG about the statement when she was on the stand, since the statement was not received in evidence until after AG was excused. According to the defense, this put appellant in the awkward position of either having to introduce the hearsay statement itself in order to cross-examine AG about it "or he would have had to risk inflaming the members by re-calling the child as a witness in order to perform a full and effective cross-examination." Final Brief at 8.

We deem this issue to be without merit. There is no indication in this record that appellant had ever requested an opportunity to cross-examine AG about the prior statement or that he ever was refused such an opportunity. If the mere fact of recalling the victim might have had the effect of inflaming the passions of the court-members against appellant, the defense might have asked the military judge to recall her, but they did not. Frankly, we doubt that merely recalling the victim would have had an adverse effect on appellant, although it is conceivable that aggressive, abrasive, or insensitive cross-examination might have. Appellant could not complain, however, if the very exercise of his right of cross-examination damaged him--that is a risk he must decide whether to take.

Under the circumstances here, however, it is quite likely that the defense concluded they had nothing to gain by cross-examining the victim about the prior statement. Since she had already denied knowledge and memory of not only the events, but even her prior statement, the defense may not have wanted to risk having her remember them, reiterating the statement to the members in the process. In any event, it is clear that cross-examination was available to the defense at all appropriate times.

ISSUE III

The final issue relates to an instance of appellant's uncharged misconduct which was received in evidence over defense objection. More precisely, however, the question advanced by appellant pertains to the correctness of the Court of Military Review's decision, ostensibly, that the evidence was admissible on the basis that appellant placed the element of intent in issue when defense counsel cross-examined the victim [TC] about innocent acts of contact between the victim and appellant. Unpub.op. at 4.

Previous to the court-martial, appellant, before the Tulare County, California, Municipal Court, pleaded no contest to, and was found guilty of, a misdemeanor sexual battery on KG, the then 11-year-old daughter of appellant's sometimes girlfriend (and also a aforementioned AG's older sister). That offence included an element of touching an intimate part of the victim, against her will, for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

Specifically, the Government had proffered as follows:

> In January of 1991 [KG], the eleven year old daughter of the accused's girlfriend told sheriff's department personnel that the accused had fondled her breast and "french kissed" her.
>
> [KG] will testify that she was listening to a song about a "cherry kiss" on the radio. The accused told her it was a dirty song. Although she did not ask what a "cherry

> kiss" was, he picked her up, carried her into the bedroom, and gave her a French kiss, inserting his tongue into her mouth halfway, on the bed.

The Government offered this evidence under Mil.R.Evid. 404(b) as proof of appellant's "motive" and his "intent to arouse and gratify his sexual desires," the latter being an element of several of the offenses alleged herein under Article 134.

Mil.R.Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Based upon the Government's proffer, the military judge ruled the evidence was admissible "for the purpose of showing the intent [of] the accused." He reserved judgment on whether it was admissible for other purposes.

In his opening statement, trial counsel described for the members the uncharged misconduct evidence; then he introduced it in evidence in his case-in-chief through the testimony of KG and through appellant's various admissions of that conduct. It appears that trial counsel never actually published to the court members the Tulare County Court documentation of the conviction.

Apparently, the judge ultimately enlarged his ruling, because his limiting instructions on findings were not confined to intent or to the Article 134 offenses. Specifically, the instructions included:

> Evidence of other You are advised that the [uncharged misconduct] evidence may be considered by you for the limited purpose of its tendency, if any, to prove that the accused *intended to gratify his sexual desires* and of its tendency, if any, to prove the *motive of the accused being to satisfy his own sexual desires.*

(Emphasis added.)

The short answer to the granted issue is that the court below did not err in affirming the military judge's ruling on the basis that appellant placed the element of intent in issue because it does not appear that court based its decision on appellant's somehow placing intent in issue. What that court stated regarding the uncharged misconduct was as follows:

> You are advised that the [*United States v. Reynolds*, 29 MJ 105, 109 (C.M.A. 1989), *we find the military judge did not abuse his discretion in deciding to admit this evidence for the purpose of establishing the appellant's intent, particularly as to those offenses charging indecent acts.* [Citations omitted.] As to the appellant's contention that he did not put his intent in issue by merely disputing whether these events ever occurred, we *note* that although the

> appellant's testimony and his defense counsel's argument on findings ... [were] based on the assertion that the victims were all lying, the defense did bring out other information raising the possibility that the appellant's behavior with at least one of the victims (T) may have been innocent. During the cross-examination of T, the defense elicited testimony that the appellant would rub Ben Gay on T's legs when he (T) would get a "Charlie horse." Record at 101. The indecent acts charged in relation to T were that the appellant "fondled the buttocks and anus of. . . [T] with his hands with intent to arouse and gratify the sexual desires of the. . . [appellant]." Charge IV, Specification 1.

Unpub.op. at 3-4 (emphasis added).

Whatever the import of the court's "note," it seems clear enough that the holding was that admission of the prior conduct was within the permissible discretion of the military judge on the issue of *mens rea*--which of course the Government must prove beyond a reasonable doubt as to each and every offense--and particularly with respect to the specific intent elements of the three indecent act offenses charged.

But even if fairness to the parties permitted us now to change the granted issue and to resolve this case on the propriety of the actual basis of the opinion below or to go beyond even that and to consider the correctness of the military judge's underlying ruling, it would be a close question as to whether the military judge or the Court of

Military Review abused their discretion. Certainly, admissibility of prior sexual uncharged misconduct evidence has been one of the more vexing areas of the law, *see* E. Imwinkelried, *Uncharged Misconduct Evidence* §§ 4:15-16 (1984)--so much so that, in any trial under the rules of evidence now in effect, such prior acts are purportedly admissible *per se*.[3] *See also What is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases*, The Army Lawyer 13 (Dept. of the Army Pamphlet 27-50-235, June 1992).

However, it is not necessary for us to resolve this evidentiary tangle here, because even if we assume, *arguendo*, that error occurred in the receipt of the evidence, we are satisfied, on this record, that appellant was not prejudiced by it. Art.59(a), UCMJ, 10 USC § 859(a). We note that the uncharged misconduct presented

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[3] Fed.R.Evid. 414(a) provides:

> In a criminal case in which the defendant is accused on an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for it bearing on any matter to which it is relevant.

Fed.R.Evid 414(c) defines a child as "a person below the age of fourteen," and it defines child molestation broadly.

Fed.R.Evid. 414 became effective for the Federal Courts on July 9, 1995. *See* Pub.L.No. 103-322, § 320935(b)-(3), 108 Stat. 2137, reprinted in 1994 US Code Cong.& Admin. News; and Historical Notes to Fed.R.Evid. 413, Effective Dates, note following (e) Application, 28 USCA 225 (1996 Cumulative Annual Pocket Part). By operation of law (Mil.R.Evid. 1102), Fed.R.Evid. 414 became part of the Military Rules of Evidence on January 5, 1996.

in this case was almost trivial in comparison to the serious charges before the court-martial. Indeed, the court-martial featured the testimony of appellant's natural daughter, AC, 11-years-old at the time of trial, who described how, over a period of time about 4 years earlier, appellant repeatedly sodomized her and forced her to sodomize him. Further, appellant's natural son, TC, 9-years-old at the time of trial, described graphically how appellant had crept into bed with him in the night, pulled down his pants, and anally sodomized him. TC also described multiple other sexual assaults committed by his father. Nevertheless both AC and TC testified that they missed their dad and wanted to see him again.

Regarding DG and his sister, AG, both were permitted to testify via closed circuit television due to the extent of their fears of appellant and the damage that a confrontation might cause them. DG, 9-years-old at the time of trial, was the son of appellant's sometime girlfriend. He described multiple instances of appellant's fondling his genitalia and buttocks, as well as his threatening him with being sent to a foster home if he told his mother. AG's limited testimony and her hearsay statement are described in connection with Issue I.

In addition, Carlene Williams, a foster mother who had custody of TC and AC for over a year before the court-martial, testified about the bizarre, sexually-oriented behavior of the children she had observed and about their other difficulties, such as bed-wetting.

A psychologist, Dr. Scott Van De Putte, who specialized in treating sexually abused boys, testified various behavioral characteristics often exhibited by sexually abused children, and in particular, he described

the various unusual behaviors of TC, whom he was treating. In addition, without defense objection, Dr. Van De Putte related many of the statements against appellant made by TC during treatment. *See* Mil.R.Evid. 803(4).

Shirley Paintz-Scott, a psychotherapist specializing in child sexual abuse who was treating DG and AG, testified about the damaged psychological condition of the children, their various behavior manifestations, and their relationship to characteristics frequently observed in sexually abused children.

Finally, the parties stipulated that a Pediatric Nurse Practitioner who had examined all four of the children would testify, if called as a witness, that she found "nonspecific irregularities might be caused by abuse, but they might have other causes, and they neither prove nor disprove sexual molestation.

The defense consisted of character testimony offered by a series of co-workers, supervisors, and acquaintances, as well as numerous documents evincing awards and commendations for outstanding Naval service. In addition, appellant testified and emphatically denied committing sexual acts on his own children or those of his girlfriend. His theory about why all the children lied about the sexual misconduct was that he punished them so severely that they wanted him out of the house. Falsely accusing him of bestial sexual misconduct was their way of achieving that goal. Appellant implied that it was other adults who had abused the children, and he charged that the children had been led and coerced "[b]y the various people that everybody has seen" into making these false allegations against him.

Picking up on that theme, defense counsel announced to the military judge his theory of the case, as follows:

> [KG] and the French kiss business got Charlie out of the house. The kids liked that. They thought of new things to get Charlie out of the house and keep him out of the house.

He had made the same point to the members during opening argument.

Accordingly, in cross-examining each of the children, defense counsel "always ask[ed] them the question, 'Did you know what happened to ...[KG]?' And then ... [he] link[ed] that, 'Have you talked to other people?'" thus, the uncharged acts against AG fit right in to the defense thesis that the children were making up the accusations against appellant to get him out of their lives.

In sum, the granted issue is without merit in that it is premised on a misstatement of the holding of the court below. Further, even if we expand the granted issue to include the general propriety of receipt of the uncharged-misconduct evidence and assume that it was improperly received, we cannot say on this record that appellant is entitled to relief. Considering the general nature of the uncharged misconduct evidence in comparison with the charges and the evidence adduced thereon, and given the limiting instructions as to its purpose provided by the military judge and the defense theory of the case, we are persuaded that receipt of the prior misconduct did not "materially prejudice the substantial rights of the accused." Art. 59(a). For these reasons, we hold that the granted

issue is without merit.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges SULLIVAN, CRAWFORD, and GIERKE, and Senior Judge EVERETT concur.

APPENDIX

Military Judge's findings on Residual Hearsay Evidence.

MJ: Well, it is the opinion of the court that what is to be addressed are specific guarantees of trustworthiness, regardless of whether you're talking about 803 or 804, and the court, of course, needs to take into consideration all the factors surrounding this case including the age and ability of the alleged victim. given the gravity of the offense and the nature of the accusation, the court would not with to allow the statement into evidence unless satisfied that these guarantees were present in this case.

The court feels it must look to several circumstances in order to determine that, one of which is the appearance of the accused [sic]. The court isn't so concerned with availability or unavailability of the person was a witness but rather the possibility of getting other evidence on this same point. Consequently, should the accused [sic] simply now show up, the court would be unable to determine what the accused's--I mean, the victim's responses would be to the various questions and really unable to satisfactorily resolve the issue of other available evidence. So, unavailability plays a role, and the role is whether or not this testimony of that is, from her; so this is sort of a contingent point. It has been represented that this witness will testify and

what this witness will say. If that's different from the representations, then, of course, the response may be different as well.

Also, there does appear to be some fear of the accused established in the statement by the victim. I agree with the defense. Subsequent interviews that could be used to speculate what level of fear might be present at an earlier date are not probative on this point, but, of course, the interview itself is probative on this point, and there are some places in here where this particular witness does disclose apprehension about the accused and the overall tenor of it certainly demonstrates a reluctance to say anything bad about the accused. There could be various reasons for that. It doesn't automatically make the statement truthful. It doesn't automatically mean that the reason is a fear of reprisal, but it could mean that, and it's a factor, and the court will consider that factor together with other factors.

The court, therefore, finds that the accused--alleged victim did, in fact, possess a measure of apprehension about saying anything detrimental about the accused.

The parties must also take into account that the--that a five-year-old [at the time of the declaration] does not operate the same way as an older individual and that while the accused's constitutional rights aren't going to be brushed to one side to

accommodate that, nevertheless, the idea that they can be perennial victims with no recourse is not an accurate assessment either. So, their special circumstances must be given consideration within the contest of the accused's right to confrontation and other matters.

So, in looking over the statement, it's the opinion of the court that the--it was not conducted with a strong or heavy prosecutorial bias. The responses tend to suggest a recitation from memory as opposed to responding to suggestions contained within the questions. The are several questions where the response suggests that it came [from] memory. Let's see if we can pick a couple out as examples here, and there were one or two instances in here where even the questioner may have posed, "Was it A or B?" the witness said, "Neither. It was C," which I think tends to run contrary to the idea that in eagerness to please the interrogator she's either taking the suggestions posed by the interrogator or picking one or two possibilities suggested. There are many instances of this. So, the court does not feel that the interrogation was heavy-handed or titled in favor of the prosecution.

Page 3, "Would Charlie touch you on top of your clothes or under your clothes?" "Under my clothes because I had on." "You had on what? A swimsuit?" "Pajamas."

This is one example answer that seems to the court to be more of a response from memory of events rather than following the suggestion.

Concerning the truth or falsity of the statement, it's correct that there does not appear to be a standard series of preliminary questions designed to determine whether the witness knew the difference between the truth and no truth. However, that is not going to render it defective per se. The responses to the questions generally can be weighed to determine whether or not it appears that an individual responding to them possesses the ability to distinguish between truth and falsity, which, of course, can then also be inferred from the ability of the individual to reason and to understand an respond to questions and the sensibility of it.

I'm not so sure that I'm prepared to say that the level of vagueness is a guarantee of authenticity of--but I would note that it does not appear to have a rehearsed sound, bearing in mind that if these events did not occur, then this particular victim would be lying in all respects, and these responses would then have to be viewed as the product of a rehearsal or deliberate effort to falsify.

The defense has indicated that instead of being motivate to be truthful, the victim was in fear of the accused. If it existed, it would be a motive to lie as a means of

removing herself from the proximity of the accused, which the government said that had already taken place. That's a possibility, I suppose. How likely it would be under all the circumstances is certainly a weight question, and one must consider the likelihood and the ability of one that age to generate this particular type of tale with or without assistance to do that; but with regard to that, the court does feel that there is an element of fear of displeasing the accused, and, therefore, statements and information which seem to this witness to be likely to displease the accused are hard to give, and I feel this comes through in the statement.

There is no particular thing. I think everything has to be taken together, and in this particular case, given the age of the accused [sic], the feelings of apprehension and fear--I'm sorry; I keep saying "the accused" when I mean "the alleged victim"--and the fear of the accused, together with the nature of the examination, it not being, in the court's opinion, tainted by heavy prosecutorial bias and there being contained within responses which tend to suggest that the responses were given more from memory, the court feels that this would be in some respects akin to admissions being given against the interest of the person being questioned, which tends, in other areas of hearsay, to satisfy the requirement for some type of guarantee. At her age and with this relationship and with the remarks given, the

> types of questions being asked and responses given, it is the opinion [sic] that the evidence that she gave that is adverse to the accused was given reluctantly with a measure of fear, but this is a specialized case. This deals with her age and her circumstances and her relationship to this accused. The court wants to be very careful and no try to suggest that first of all, all children are truthful per se or that accusations, because of harm to the person accused, must necessarily be truthful. But the court feels, balancing all the facts in this case, that it does rise to that level; and, therefore, the court will admit it. It is subject, however, to the appearance of the alleged victim and her testifying pretty much as represented. The therapist, and her statement, as noted earlier, it would not be considered for these purposes, it being given subsequent.

So, the government's motion to allow this evidence in as hearsay is granted, or rather, I should say the defense objection to the evidence as being inadmissible is denied or overruled.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

ALBERT A. REED JAMES E. ORR
WILLIAM A. DeCICCO

UNITED STATES

v.

Lester C. Casteel, 491 60 2561
Aviation Structural Mechanic
Hydraulics First Class (E-6), U.S. Naval Reserve

NMCM 93 00109 Decided 31 March 1994

Sentence adjudged 1 July 1992. Military Judge: Philip F. Roberts. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base San Francisco, San Francisco, CA 94130-5018.

LT FRANKLIN J. FOIL, JAGC, USNR, Appellate Defense Counsel

LT SCOTT A. BROWNE, JAGC, USNR, Appellate Government Counsel

ORR, Senior Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer and enlisted members of committing sodomy with his son and daughter, of indecent acts with his son and two other children who were living in his

house at the time, by taking indecent liberties with his daughter, and trying to impede an investigation by communicating a threat to one of the other children in violation, respectively, of Articles 125 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 925, 934. The panel sentenced the appellant to confinement for 8 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant's criminal behavior with these children, although not continuous with each child, spanned a period of over 3 years, beginning in January 1988 and continuing through February 1991. At the time of trial, approximately 17 months later in June-July 1992, his daughter was 11 years of age, his son ("T") was 9, and the other two children, a boy ("D") and a girl ("AL"), were 7 and 6 years of age, respectively.

Before this Court, the appellant has raised eight assignments of error.[1] The first of these protests the use

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[1] I. THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE PRIOR STATEMENT OF . . . [AL] INTO EVIDENCE UNDER THE RESIDUAL HEARSAY RULE.

II. THE MILITARY JUDGE ERRED WHEN HE ALLOWED EVIDENCE OF THE "FRENCH KISS" INCIDENT INTO EVIDENCE IN VIOLATION OF MIL. R. EVID. 404(b).

III. THE MILITARY JUDGE ERRED WHEN HE DENIED DEFENSE COUNSEL'S CHALLENGE FOR CAUSE AGAINST CHIEF MARLER.

IV. APPELLANT'S RECORD OF TRIAL CONTAINS A SUBSTANTIAL OMISSION WHICH MAKES IT INCOMPLETE, NONVERBATIM, AND INSUFFICIENT FOR THOROUGH

of an audio tape recording of the youngest child, AL, being interviewed by a female detective with the local sheriff's office approximately a year before trial. Record at 211-19. The military judge permitted the playing of the audio tape under Mil. R. Evid. 803(24) and 804(b)(5) after AL testified that she did not know if she remembered whether the appellant had done "other bad things to her" other than spankings and she did not remember what she had told the female detective. Record at 169-70. Based on this testimony, the judge found that AL was essentially unavailable. Record at 205.

The military judge analyzed the making of the audio tape recording for the "particularized guarantees of trustworthiness" required by *Idaho v. Wright*, 497 U.S. 805 (1990), for the acceptance of evidence under the residual hearsay rule, and concluded: (1) that the interview was not

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APPELLATE REVIEW.

V. THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE GOVERNMENT TO AMEND CHARGE I, SPECIFICATION 2 AND CHARGE II, SPECIFICATION 1 DURING TRIAL, SINCE THE AMENDMENTS WERE NOT MINOR CHANGES. [CITATIONS AND FOOTNOTE OMITTED.]

VI. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF THESE OFFENSES. [FOOTNOTE OMITTED.]

VII. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE. [CITATION OMITTED.]

VIII. THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. [CITATION OMITTED.]

conducted with a strong or heavy prosecutorial bias; (2) that AL's recorded responses suggested a recitation from memory as opposed to responses to suggestions contained in the questions; (3) that although there was no standard series of preliminary questions to establish whether AL knew the difference between telling the truth and telling a lie, it could be inferred from AL's expressions during the interview and her ability to reason, understand, and respond that she understood the distinction; (4) that AL's responses did not indicate that the interview was rehearsed; and, (5) that it was also apparent that AL did not want to displease the appellant and information she provided, that she perceived to be likely to displease the appellant, was difficult for her to disclose which, given her age and her relationship to the appellant, made the information similar to admissions against AL's own interests. Record at 18-21.

Based upon our own review, we adopt the military judge's findings as our own and conclude that the judge did not abuse his discretion in admitting AL's statements in the audio recording as residual hearsay. *See United States v. Pollard*, 38 M.J. 41 (C.M.A. 1993).

II.

In his second assignment of error, the appellant contends that his no-contest plea to and subsequent conviction for sexual battery for "french kissing" D's and AL's 11-year-old sister by the Tulare County Municipal Court of the State of California should not have been admitted because the element of the appellant's intent was never in controversy in the offenses before us, that the "french kiss" episode was a different kind of act with a different kind of victim from the offenses charged, and that

the prejudicial effect of such evidence greater outweighed its probative value. The military judge found the evidence of the earlier conviction to be admissible for proving the appellant's intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both, which is an essential element of the indecent acts offenses charged against the appellant. Manual for Courts-Martial, United States, 1984 (M.C.M.), Part IV, ¶ 87b(1)(d); record at 42. The judge reached this conclusion because the conviction for sexual battery also required proof of a similar intent or purpose. Cal. Penal Code § 243.4(d); Prosecution Exhibits 2, 3. In addition to the conviction, the victim of the incident was permitted to testify about it, record at 262-63, and a Naval Investigative Service agent was allowed to testify that during an interview of the appellant prior to the state hearing on the offense that he admitted he "french kissed" the 11 year-old girl, record at 269.

Applying the criteria used by the U.S. Court of Military Appeals in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), we find the military judge did not abuse his discretion in deciding to admit this evidence for the purpose of establishing the appellant's intent, particularly as to those offenses charging indecent acts. *See United States v. Bender*, 33 M.J. 111 (C.M.A. 1991), *aff'g* 30 M.J. 815 (A.C.M.R. 1990); *United States v. Orsburn*, 31 M.J. 182 (c.M.A. 1990); *cert. denied*, 498 U.s. 1120 (1991); *United States v. Cueller*, 27 M.J. 50 (C.M.A. 1988), *cert. denied*, 493 U.s. 811 (1989); *United States v. Peterson*, 20 M.J. 806 (N.M.C.M.R. 1985). As to the appellant's contention that he did not put his intent in issue by merely disputing whether these events ever occurred, we not that although the appellant's testimony and his defense counsel's argument on findings was based on the

assertion that the victims were all lying, the defense did bring out other information raising the possibility that the appellant's behavior with at least one of the victims (T) may have been innocent. During the cross-examination of T, the defense elicited testimony that the appellant would rub Ben Gay on T's legs when he (T) would get a "Charlie horse." Record at 101. The indecent acts charged in relation to T were that the appellant "fondled the buttocks and anus of . . . [T] with his hands with intent to arouse and gratify the sexual desires of the . . . [appellant]." Charge IV, Specification 1.

III

As to the appellant's third assignment of error, the prospective member in question told the court that his wife had been raped in 1981 and his sister was raped when she was 17 years old. He also stated that he would not hold either of those crimes against the appellant, that he would presume the appellant was innocent of the crimes charged against him and that he thought he could be fair and objective despite what had happened to his wife and sister. The defense counsel asked no questions concerning this revelation. Record at 64. We find no abuse of discretion in the miliary judge's refusal to sustain the defense counsel's challenge for cause, which was based solely on the fact that the prospective member's wife and sister had been victims of sex-related offenses sometime in the past. Not only were these offenses somewhat dissimilar from those charged against the appellant, the prospective member was not, himself, the victim. *Cf. United States v. Smart*, 21 M.J. 15 (C.M.A. 1985)(holding that challenge for cause should have been sustained against member who gave equivocal *voir dire* responses to questions concerning lack of bias but was not *per se* disqualified for being

victim of an offense similar to that charged). Although the military judge did not conduct any further questioning of the prospective member, we conclude that his answers were unequivocal and did not manifest any cause to disbelieve his assertion that the offenses perpetrated against his wife and sister would not influence him. *United States v. Reichardt*, 28 M.J. 113, 116 (C.M.A. 1989).

IV.

In his fourth assignment of error, the appellant points to numerous instances in the ten pages of testimony by D, who was 7 years of age at the time of trial, where the court reporter indicates in the record that D gave " no audible response" to certain questions. In his brief on this issue, the appellant states that "[a]lmost all of the responses during cross-examination . . . [of D] were not recorded." Appellant's Brief at 7. We do not construe this general statement, unsupported by any specific examples, to be an assertion that there was actually a response that was simply not recorded.

From our reading of the record of trial, it appears the child simply said nothing when asked questions he either didn't understand or did not wish to answer. In either instance, counsel merely rephrased the question or moved on. We fail to see how the failure of a young child to respond to every question asked of him particularly about the subject of sexual abuse, can be construed as a failure to provide a complete record as the appellant now asserts, and none of the cases cited in support of this assigned error bears any factual resemblance to this situation. If in fact D was giving responses that simply could not be heard, the trial defense counsel should have asked that the witness be instructed to speak louder and to

repeat his answer. If D was giving non-verbal responses (and there were some, which the trial counsel or the military judge explained for the record), the trial defense counsel should have acted to ensure that the record properly reflected the response.

We conclude that the record of trial is not incomplete and is substantially verbatim. *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

V.

In his fifth assignment of error, the appellant complains that the military judge should not have permitted the Government to amend two specifications during trial to conform the offenses to the testimony of T. One specification alleged that the appellant had committed sodomy with T at or near Virginia Beach, Virginia, between October 1988 and September 1989. Charge I, Specification 2.[2] The second alleged that the appellant had committed an indecent act with T at or near Porterville, California, between December 1990 and February 1991. Charge II, Specification 1. Over objection by the trial defense counsel, the military judge permitted the Government to amend the sodomy specification to "at

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[2] All of the parties and the court-martial order refer to this offense as Specification 2 of Charge I. Actually, Charge I, on which appellant was arraigned, record at 8, and which was subsequently withdrawn by the Government, record at 43, was alleged as a violation of Article 125, UCMJ. While renumbering the charges for the benefit of the members may have been a necessity in this case, that renumbering should not have persisted beyond the conclusion of the trial. We shall address this error in our disposition of this case. To prevent confusion, however, we shall continue to refer to the charges as referenced by the parties before this Court.

or near Porterville, California, between October 1988 and February 1991" and the indecent act specification to "at or near Virginia Beach, Virginia, between October 1988 and February 1991." Record at 152.

The military judge found that appellant was on notice concerning his behavior with the children, and T in particular, between October 1988 and February 1991 at both locations where the appellant had maintained a home before and after his transfer from Virginia to California. Under this circumstance, he concluded that the amendments were minor and did not constitute a material variance. We agree. The appellant did not rely upon alibi as a defense in this case, but he contended that the victims were fabricating their testimony. Consequently, the amendments did not undermine his defense, and the appellant was on notice of the time frame in which all of these offenses had allegedly occurred. We conclude that neither the dates nor the locations where these offenses occurred were "offense defining." *See United States v. Brown*, 34 M.J. 105, 109-110 (C.M.A. 1992).

VI.

As to the appellant's sixth assignment of error, we are convinced beyond a reasonable doubt of the appellant's guilt of the offenses of which he was convicted. *See United States v. Turner*, 35 M.J. 324 (C.M.A. 1987). The appellant's remaining assignments of error are also without merit. *Weiss v. United States*, 114 S.Ct. 752 (1994).

Accordingly, the findings and sentence, as approved on review below, are affirmed. As noted in footnote 2, above, the court-martial order fails to include a charge on which the appellant was arraigned. See R.C.M. 1114(c)(1). The issuance of a corrected order is hereby ordered.